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In the course on International Law there was plenty of material available in the way of case-books and text-books. In the course on Military Law the excellent Manual for Courts-Martial was available to take care of the subject of the law relating to the discipline of the army. But there was no book available covering the other subjects included in Military Law and the course on War-Time Legislation. Colonel Wigmore, versatile and ready for any emergency, immediately set to work to have a book prepared and, with the aid of Dean Merton L. Ferson, in a very few weeks produced the source-book. What the book purports to do, it does well; it furnishes an abundance of material for the proposed courses. In it are collected pre-war statutes relating to the military organization, and judicial opinions on a variety of matters affecting "military persons and others who have relations with them;" and war-time statutes, regulations and general orders, federal judicial opinions and opinions of the Judge Advocate General. The war-time statutes include the principal acts of Congress made necessary by the emergency; the war-time judicial opinions and opinions of the Judge Advocate General deal with a vast variety of subjects from the constitutionality of the Selective Service Law to the compensation for labor of prisoners of war. The range of the material is extremely wide; the arrangement is for the most part chronological. Of course no teacher would be cruel enough to take up the subject in the order in which it is presented, nor could he possibly cover all the matter presented; of course it could not have been intended that he should. It would be possible however by a wise selection and arrangement to give a course of considerable interest and perhaps of some value—a course which could not be given without the aid of a book like the source-book. With the signing of the armistice the whole plan fell through and probably nowhere will any course be given based upon the source-book. The book is however available as a useful book of reference. Dramatically it shows how the military problems of peace and the problems of the war were met by Congress, the courts and the War Department. Of especial interest are the opinions of the Judge Advocate General, for only a digest of these is elsewhere published.

AUSTIN W. SCOTT.

COMMERCIAL ARBITRATION AND THE LAW. By Julius Henry Cohen. D. Appleton and Company. 1918. pp. xx, 339.

The title of this volume rather leads one to expect a discussion of the relative merits of arbitration and ordinary litigation, together with information concerning the actual use made of arbitration in various jurisdictions. There is something of this in the first fifty pages. The treatment however is by the way. It is neither complete nor very well arranged. This is probably explained by the fact that the book, according to the preface, is an amplification of a brief filed in a New York case by Mr. Cohen, as *amicus curiae*, acting at the request of the New York Chamber of Commerce. The only report of that case which has come to the writer's attention is found in 163 N. Y. Supp. 516. It says nothing as to arbitration. Questions of that kind must have been eliminated in the lower court.

The main thesis of Mr. Cohen's work seems to be that courts of law should recognize all agreements for arbitration as valid and enforce them with all the powers at their command. Possibly he goes so far as to believe that courts with equity powers should specifically enforce such agreements. See pages 250, 251, and 274. Of course it is settled law that equity will not specifically enforce them. Probably the best reason for equity's refusal to act is that it would be difficult to supervise the performance of such an intricate proceeding as an arbitration. When Mr. Cohen, on page 251, says that Mr. Justice Story was wrong in his statement that no case supports specific performance of such an

agreement, he fails to cite any authority for his criticism of Story. He may have been relying on a few early cases in which courts of equity have refused to lend their special aid to a plaintiff who filed his bill in actual breach of an agreement to arbitrate. He discusses these cases in Chapter XIII. However, the difference between, on the one hand, refusing the aid of an equity court to one who violates an arbitration agreement and, on the other hand, specifically enforcing such an agreement is obvious.

Specific performance aside, one may in the main agree with Mr. Cohen's contentions concerning what the law ought to be. That agreements to arbitrate are valid contracts for the breach of which an action for damages will lie, should be and is the common law. Whether a court should refuse relief to a party who has broken an agreement to arbitrate depends on whether such a breach is substantial, goes to the essence of the contract. Probably it is of the essence in most cases. The common law refused to consider such a breach a bar. It took a statute in England to change the rule. But the common law held that a party could protect himself against a suit in disregard of a contract to arbitrate by making arbitration an express condition precedent to liability. Then no suit could be brought prior to the performance of the condition. This common-law rule with the addition of the English statutory rule just mentioned seems then to reach the sound result. Unfortunately statutes like the English one have not been generally adopted in this country. It would seem that Mr. Cohen should urge the adoption of such statutes. Instead he attempts to convince us that the early common law did bar suits in breach of an agreement (not put as a condition precedent) for arbitration and, that after a period of unfortunate error the English courts have at last returned to their original and correct position. In this he fails. Outside the condition precedent cases, the English courts do not refuse to entertain suits in violation of an arbitration agreement except under the statute already mentioned.

The writer wishes to express no opinion on the accuracy of Mr. Cohen's use of authorities: he simply offers the following samples of it.

(a) On page 104 a case from Bracton's Note Book (number 649) is explained at some length. The actual gist of the case is that Simon de Chelefeuldia sued William de la Mare for having prosecuted an action against Simon, concerning a rick of hay, in the Court Christian — contrary to a prohibition from, probably, the King's Bench. Simon produced his suite (*sectam*) which was examined and found insufficient. William put in a plea (possibly actually proffered before the examination of Simon's *secta*) that he had not sued Simon after the prohibition and that in truth they had agreed to arbitrate the matter. It was decided that since Simon's suite was insufficient, William should go without hay and Simon be in mercy. Mr. Cohen's idea of the case is that William sued Simon for damages to hay, that Simon pleaded that the matter should be tried in a peaceful Christian court under an agreement to arbitrate, that William contended that the agreement was insufficient, that Simon produced another such agreement which the court held sufficient to bar William from this suit in the King's Bench. Mr. Cohen in his interpretation of the case translates *secta* as equivalent to writing or agreement. That it means the suite of witnesses which a party in early procedure was bound to bring with him is sufficiently established by referring to Pollock and Maitland's "History of English Law," I, 467, II, 599, 607, 634-37.

(b) On page 113 Mr. Cohen discusses a case found in Y. B. 21 H. VI, pl. 30 a. It was an action of debt. The defendant pleaded *nil debet*. Quoting now Mr. Cohen's language, "The case does not disclose its outcome. All that we find at the end is: 'And he made his law.'" That this means that the defendant *won* by compurgation is clear by a reference to Pollock and Maitland's "History of English Law," II, 212, 608, 633.

(c) To turn to more modern matters, on page 227, Mr. Cohen gives two lists

of cases, one of cases allowing a party to revoke the power of an arbitrator at any time before the award, the other of cases opposed to such revocability. After these are some later cases not definitely assigned to either column. An examination of the cases alleged to be opposed to revocability and of those not placed in either column shows that not a single one of them decides anything about revocability. One case, *Drew v. Drew*, 2 McQ. Sc. Ap. 1, contains a *dictum* that the common law holds the arbitrator's authority *revocable* though the court thinks the common law unfortunate. What then do these cases hold? Simply various points in the English law of arbitration. They may be summarized as follows: A contract to refer is valid and once made cannot be rescinded by one party alone. *Piercy v. Young*, L. R. 14 Ch. D. 200. (Distinguish rescinding the contract to refer and breaking it by revoking the power of the arbitrator.) An agreement to refer is not a bar to legal proceedings before reference. *Collins v. Locke*, L. R. 4 A. C. 674. Two early equity cases refusing the special aid of equity to one who had broken his agreement to refer. *Waters v. Taylor*, 15 Ves. Jr. 10; *Harcourt v. Ramsbottom*, 1 Jac. & W. 505. Where arbitration is made an express condition precedent to a cause of action, no suit lies without arbitration whether in equity, *Halfhide v. Fenning*, 2 Bro. Ch. C. 336, *Dimsdale v. Robertson*, 2 Jones & La Touche, 58, or at law, *Scott v. Avery*, 5 H. L. Cases, 811, and several later cases following it. Arbitration of the *cause of action* as well as the *amount of damage* may be made a condition precedent to suit. *Trainor v. Fire Assurance Co.*, 65 L. T. R. 825, *Spurrier v. La Cloche* (1902), A. C. 446, *Gaw v. British Law Fire Insurance Co.* (1908), 1 Ir. R. 245. Cases distinguishing from contracts to arbitrate agreements that the sufficiency of performance, value, or other matters shall be decided *ex parte* by an architect or engineer. *Northampton Co. v. Parnell*, 15 C. B. 630, *London Co. v. Bailey*, L. R. 3 Q. B. D. 217. Cases on the effect of arbitration agreements in Scotland, *Caledonia Co. v. British Law Fire Insurance Co.*, 10 Sess. Cas. 3d Ser., 869. And, finally, omitting three or four miscellaneous decisions, cases in which suits, brought in breach of an agreement to arbitrate, were stayed under the English statutes. *Russell v. Pellegrini*, 6 E. & B. 1020, *Hamlyn & Co. v. Distillery* (1894), A. C. 202, and others. Did Mr. Cohen think that every case which expressed an opinion favorable to settlement of disputes by arbitration could be cited as establishing that the authority of an arbitrator is irrevocable?

CLARKE B. WHITTIER.